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No.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

ORESTES LUCIANO ABREU

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES DAVID THORNBRUGH

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether a defendant who is convicted in a single proceeding of multiple violations of 18 U.S.C. 924(c) is subject to the statute's provisions imposing a more severe sentence for "second or subsequent" convictions.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in these cases.

OPINIONS BELOW

The en banc opinion of the court of appeals (App., *infra*, 1a-19a) and the panel opinions disposing of respondents' other claims (App., *infra*, 20a-44a, 45a-62a) are not yet reported.

JURISDICTION

The judgment of the en banc court of appeals was entered on April 13, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 924(c)(1) of Title 18 of the U.S.C. currently provides in relevant part: [1]

> Whoever, during and in relation to any crime of violence or drug trafficking crime * * *, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years * * *. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years * * *. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

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[1] Respondent Abreu committed the offenses at issue on April 3, 1988. At that time, Section 924(c)(1) mandated a sentence of ten years for any "second or subsequent conviction." See 18 U.S.C. 924(c)(1) (Supp. V 1987). The statute was amended by the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6460(2)(A), 102 Stat. 4181, 4373 (Nov. 18, 1988), to require a mandatory sentence of 20 years in the case of any second or subsequent conviction. See 18 U.S.C. 924(c)(1) (1988). Respondent Thornbrugh committed his offenses in 1989 and was sentenced under the current version of Section 924(c)(1). App., *infra*, 4a n.2.

STATEMENT

1. From approximately January 1987 to April 1988, respondent Abreu and co-defendant Juan Carlos-Alvarez sold cocaine in Utah. In late 1987 or early 1988, one of their customers gave Abreu a Mini-14 semi-automatic rifle and a .38 caliber revolver as collateral for a credit purchase of cocaine. The customer never redeemed the firearms, and Abreu and Alvarez retained possession of the firearms at the apartment they shared. 9/12/89 Tr. 75-77, 85-86, 89-91, 152-53, 159-61; 9/13/89 Tr. 42-46, 60-62, 74-76.

In February 1988, a government informant made several controlled purchases of cocaine from Alvarez. Federal agents subsequently tried to use the informant to make a large-scale controlled purchase from the defendants; that proved impossible, however, because Abreu refused to complete the transaction at the informant's apartment. 9/11/89 Tr. 6, 9, 12, 19-20; 9/12/89 Tr. 99-100; 9/13/89 Tr. 31.

Federal agents arrested Abreu and Alvarez in April 1988. After obtaining a warrant, the agents searched their apartment and seized approximately two ounces of cocaine from the kitchen. They also seized the rifle and the revolver from a closet in Abreu's bedroom. 9/11/89 Tr. 34-36, 40-42, 73, 76-78; 9/12/89 Tr. 29-30; 9/13/89 Tr. 41, 54-56, 75.

At trial, the government proved that Abreu used the two firearms in connection with two drug trafficking offenses. Abreu was convicted of conspiracy to possess and to distribute cocaine, in violation of 21 U.S.C. 846 (Count 1); possession of more than 500 grams of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) (Count 2); use of the semi-automatic rifle in connection with the substantive drug offense charged in Count 2, in violation of

18 U.S.C. 924(c) (Count 3); use of the same rifle in connection with the substantive drug offense charged in Count 1, in violation of Section 924(c) (Count 4); use of the .38 caliber revolver in connection with the substantive drug offense charged in Count 2, in violation of Section 924(c) (Count 5); and use of the .38 caliber revolver in connection with the substantive drug offense charged in Count 1, also in violation of Section 924(c) (Count 6). See App., *infra*, 2a.

At sentencing, the district court ruled that Abreu's conviction on Count 3 merged with his conviction on Count 4, and that his conviction on Count 5 merged with his conviction on Count 6. See App., *infra*, 22a, 33a. Abreu was then sentenced to concurrent terms of 200 months' imprisonment on Counts 1 and 2; to a consecutive five-year prison term on Count 5; and to an enhanced consecutive ten-year prison term on Count 6 as a "second or subsequent" conviction under Section 924(c). App., *infra*, 22a.

2. James David Thornbrugh committed three bank robberies in January and March 1989. Thornbrugh was arrested after the third robbery and charged with three counts of armed bank robbery, in violation of 18 U.S.C. 2113 (Counts 1, 2, and 3), and three counts of using a firearm in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (Counts 4, 5, and 6). Thornbrugh was convicted by a jury on all six counts. App., *infra*, 46a.

At sentencing, the district court departed below the range prescribed by the Sentencing Guidelines and sentenced Thornbrugh to concurrent terms of three months' imprisonment on the bank robbery convictions. Pursuant to the enhanced penalty provisions of Section 924(c), the district court sentenced Thornbrugh to a consecutive five-year prison term on Count 4. The court also imposed two additional, con-

secutive, 20-year prison terms on Counts 5 and 6 as "second or subsequent" convictions under Section 924(c). App., *infra*, 49a.

3. Abreu and Thornbrugh challenged the enhanced sentences imposed on them under Section 924(c), and the Tenth Circuit chose to address the issue en banc. App., *infra*, 1a-19a. The court of appeals vacated Abreu's and Thornbrugh's sentence enhancements for their "second or subsequent" Section 924(c) convictions and remanded the cases for resentencing. App., *infra*, 15a.

The en banc court found that the language of Section 924(c)'s enhancement provision was ambiguous in two respects. First, the court stated that while the words "second" and "subsequent" could be read to refer to multiple events occurring at the same point in time, they also could be read, with equal plausibility, to refer to two or more events occurring sequentially. App., *infra*, 5a. Second, the court stated that the ambiguity was "heightened" because the words "second or subsequent" were used to modify the word "conviction," which was, in the absence of a statutory definition, "chameleon[-like]" in character. The term "conviction," the court concluded, could "refer either to the return of a jury verdict of guilt or to the court's entry of judgment on that verdict." *Id.* at 5a-7a. Therefore, it was "impossib[le] [to] discern[] the plain meaning of 'second or subsequent conviction' from the language of the statutory phrase" alone. *Id.* at 7a.

The court of appeals looked to the legislative history of Section 924(c) for guidance, but found the history unilluminating. Faced with a perceived statutory ambiguity, the court applied the rule of lenity and resolved the ambiguity in favor of the respondents. App., *infra*, 8a. The court examined various

federal and state enhanced-penalty statutes and found that those statutes required a final conviction as a condition precedent to the imposition of enhanced penalties for second or subsequent convictions. *Id.* at 10a-12a. The court declared that such enhanced penalty regimes were set up in that manner to allow unenhanced penalties to rehabilitate first-time convicts before increased penalties were imposed on repeat offenders. *Id.* at 12a-13a.

The court of appeals "f[ou]nd this logic persuasive" when interpreting Section 924(c) and held that:

> the words "second or subsequent" mean events that are chronologically sequential, and "conviction" means judgment of conviction. Accordingly, * * * a defendant may not receive an enhanced sentence under [S]ection 924(c) for a second or subsequent conviction unless the offense underlying this conviction took place after a judgment of conviction had been entered on the prior offense.

App., *infra*, 13a-14a. Although it recognized that its construction of the statute conflicted with the holdings of six other courts of appeals, the en banc court stated that its interpretation was "mandated by the applicable rules of statutory construction, [wa]s consistent with the other subsequent-offense statutes enacted by Congress, and best effectuate[d] the purposes underlying such [penalty] statutes generally." *Id.* at 14a.

Judge Brorby dissented, joined by Judges Tacha and Baldock. The dissenters stated that in their view the plain meaning of the statutory language dictated the conclusion that "a second or subsequent conviction charged in the same indictment as the first * * *

trigger[s] the enhancement provision of § 924(c)." App., *infra*, 19a.

REASONS FOR GRANTING THE PETITION

We submit that the court of appeals erred in holding that the sentence enhancement provision of 18 U.S.C. 924(c) applies only to "second or subsequent" convictions that occur after a conviction has been entered on a prior offense. The decision in this case has created a conflict between the Tenth Circuit and the seven other courts of appeals that have interpreted the "second or subsequent conviction" language of 18 U.S.C. 924(c). See *United States* v. *Bernier*, 954 F.2d 818, 820-821 (2d Cir. 1992); *United States* v. *Deal*, 954 F.2d 262, 263 (5th Cir. 1992), petition for cert. pending, No. 91-8199; *United States* v. *Raynor*, 939 F.2d 191, 193-194 (4th Cir. 1991); *United States* v. *Bennett*, 908 F.2d 189, 194 (7th Cir.), cert. denied, 111 S. Ct. 534 (1990); *United States* v. *Nabors*, 901 F.2d 1351, 1358-1359 (6th Cir.), cert. denied, 111 S. Ct. 192 (1990); *United States* v. *Foote*, 898 F.2d 659, 668 (8th Cir.), cert. denied, 111 S. Ct. 112 (1990); *United States* v. *Rawlings*, 821 F.2d 1543, 1546 (11th Cir.), cert. denied, 484 U.S. 979 (1987).[2]

The United States has acquiesced in the petition for a writ of certiorari in *Deal* v. *United States*, No. 91-8199, to resolve the conflict created by the decision in this case. The issue in this case is identical to the one presented in *Deal*. Accordingly, the petition

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[2] A panel of the Eighth Circuit recently suggested that that court should reconsider en banc its holding in *United States* v. *Foote*, *supra*, in light of the Tenth Circuit's holding in this case. See *United States* v. *Jones*, No. 91-1987 (8th Cir. June 9, 1992), slip op. 22.

should be held and disposed of in light of this Court's resolution of the petition in *Deal*.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of in light of this Court's resolution of the petition for a writ of certiorari in *Deal* v. *United States*, No. 91-8199.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JULY 1992

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 89-4145
(D. Utah)

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ORESTES LUCIANO ABREU, DEFENDANT-APPELLANT

Nos. 89-5166 & 89-5173
(N.D. Okla.)

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JAMES DAVID THORNBRUGH, DEFENDANT-APPELLANT

OPINION ON REHEARING EN BANC

[Filed Apr. 13, 1992]

Before McKAY, Chief Judge, HOLLOWAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, and EBEL, Circuit Judges.

SEYMOUR, Circuit Judge.

The court, on its own motion, ordered rehearing en banc in these two appeals to consider the interpretation of the enhancement provision in 18 U.S.C. § 924(c)(1) (1988). The remaining issues raised on appeal are decided separately in two panel opinions filed simultaneously with this opinion. *See United States v. Abreu*, —— F.2d —— (10th Cir. No. 89-4146 filed April 13, 1992; *United States v. Thornbrugh*, —— F.2d —— (10th Cir. Nos. 89-5156, 89-5173, filed April 13, 1992).

I.

Orestes Abreu was charged in a second superseding indictment with one count of conspiring to possess cocaine with intent to distribute, one substantive count of possessing cocaine with intent to distribute, and four counts of using a firearm during and in relation to a drug offense in violation of 18 U.S.C. § 924(c)(1).[1] Two of the section 924 charges pertained to the conspiracy count; one of those charges alleged the use of a rifle, and one alleged the use of a revolver. The remaining two section 924 charges pertained to the count charging the substantive drug offense, which was also alleged to be an overt act in furtherance of the conspiracy. One of these section 924 charges alleged the use of the rifle during the substantive offense, and the other alleged use of the revolver. Abreu was convicted on all counts. In addition to the sentences imposed on the conspiracy and drug charges, the trial court sentenced Abreu on two of the section 924 charges. The court imposed a 60-

[1] Abreu was also charged with failure to appear in violation of 18 U.S.C. § 3146(a)(1) (1988). He pled guilty to that charge and it is not at issue on appeal.

month sentence on the count charging the use of a revolver during the substantive drug offense, and an enhanced sentence of 120 months on the charge alleging use of a rifle during the conspiracy offense, the sentences to run consecutively to the drug charges and to each other.

James Thornbrugh was charged in a six-count indictment with three counts of bank robbery, occurring on three different dates, and three section 924 counts, one pertaining to each of the alleged bank robbery offenses. He was found guilty on all six counts. In addition to giving Thornbrugh concurrent sentences on the robbery offenses, the court imposed a 60-month sentence on one section 924 count, and enhanced 240-month sentences on each of the other two, these sentences to run concurrently to the robbery sentences and consecutively to each other.

Abreu and Thornbrugh both raise the propriety of their enhanced sentences under section 924. That section currently provides in pertinent part:

> "Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, ... *In the case of his second or subsequent conviction* under this subsection, *such person shall be sentenced to imprisonment for twenty years* . . . ."

18 U.S.C. § 924(c)(1) (emphasis added).[2] Defendants challenge the applicability of the sentence enhancement provision for a "second or subsequent conviction." The government urges this court to hold that the phrase "second or subsequent conviction" includes one or two separate offenses charged in the same indictment. For purposes of our en banc consideration, we asked the parties to address whether under 18 U.S.C. § 924(c) an enhanced sentence for a "second or subsequent conviction" may be imposed:

(1) when a defendant is convicted of two or more separate offenses charged in the same indictment regardless of when the offenses occurred; or

(2) only when a defendant is convicted of an offense that was committed in a subsequent *transaction* distinct from the conduct constituting the first section 924(c) offense, without regard to when the first conviction occurred; or

(3) only when a defendant is convicted of an offense that was committed subsequent to an earlier *conviction* under section 924(c).

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[2] Abreu committed the offenses at issue on April 3, 1988. At that time, section 924(c)(1) provided for a mandatory sentence of five years on a first offense, and a mandatory sentence of ten years on a "second or subsequent conviction." *See* 18 U.S.C. § 924(c)(1) (Supp. V 1987). The statute was amended by the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6460(2)(A), 102 Stat. 4181, 4373 (Nov. 18, 1988), to provide a mandatory sentence of twenty years in the case of a second or subsequent conviction. *See* 18 U.S.C. § 924(c)(1) (1988). Thornbrugh committed his offenses in 1989 and was sentenced under the current version.

II.

In order to ascertain the meaning of section 924(c), we begin with the text of the statute itself. "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). "Second" is defined as "next to the first in place or time." *Webster's Third New International Dictionary*, 2050 (1981). "Subsequent" is defined as "following in time" or "following in order of place." *Id.* at 2278. *Black's Law Dictionary*, 1351 (6th Deluxe Ed. 1990), defines "second" as "sequence in point or time." "Subsequent" is defined as "[f]ollowing time; coming or being later than something else; succeeding." *Id.* at 1427. Thus, while the words "second" and "subsequent" can be arguably read to refer to multiple events occurring at the same point in time, both words can equally plausibly be read as referring to two or more than two events that occur sequentially in time.

The textual ambiguity arising from the use of the words "second or subsequent" is heightened by the fact that these words modify "conviction," a term not defined in the statute itself and which one court has described as "a chameleon." *Harmon v. Teamsters Local Union 371*, 832 F.2d 976, 978 (7th Cir. 1987). The Supreme Court has noted that "the terms 'convicted' or 'conviction' do not have the same meaning in every federal statute," *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 112 n.6 (1983), rather, the terms "vary from statute to statute," *id.* at 113 n.7.[3] Indeed, this court has held that a conviction

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[3] The Court in *Dickerson* addressed the meaning of the term "convicted" in the Gun Control Act of 1968, 18 U.S.C.

occurs upon entry of a guilty plea for purposes of 28 C.F.R. § 2.52(c)(2), which requires the Parole Commission to order forfeiture of street time if a parolee is "convicted" of a new offense punishable by imprisonment. *See DeCuir v. United States Parole Comm'n*, 800 F.2d 1021, 1023 (10th Cir. 1986). There, however, the regulation also stated that "[a]n actual term of confinement or imprisonment need not have been imposed for such conviction." 28 C.F.R. 2.52(c)(2). On the other hand, we have also held that a conviction for purposes of adjudging a defendant as a juvenile delinquent occurs not upon the plea but upon the entry of judgment. *See United States v. Steven W.*, 850 F.2d 648, 649 (10th Cir. 1988) (citing *Lott v. United States*, 367 U.S. 421, 426 (1961) ("the plea itself does not constitute a conviction")), *cert. denied*, 488 U.S. 1012 (1988).

In short, "second or subsequent" can be read to describe either multiple events occurring at one time

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§§ 922(g)(1), (h)(1). At issue was whether a defendant was "convicted" within the meaning of the statute when he pled guilty to a state crime under a deferred sentencing procedure in which no judgment of conviction was entered. The Court there held as a matter of federal law that a person is convicted for purposes of the Gun Control Act upon a plea of guilty. This decision is not helpful to the instant inquiry for two reasons. First, the Court stressed that the Gun Control Act specifically applies not only to those convicted of a state crime, but to those who have only been indicted. *See* 460 U.S. at 115-16. The Court viewed the inclusion of indicted status as indicative of congressional intent that the term "convicted" be construed broadly. Section 924(c) has no comparable provision. Second, Congress has effectively overruled *Dickerson* in the Firearms Owners' Protection Act, Pub. L. No. 99-308, §§ 102(6), 104(b), 100 Stat. 449, 452, 459 (1986), which expressly adopts the particular state's definition of conviction. *See United States v. Pennon*, 816 F.2d 527, 529 (10th Cir.), *cert. denied*, 484 U.S. 987 (1987).

or multiple events occurring in a chronological sequence. "Conviction" can refer either to the return of a jury verdict of guilt or to the court's entry of judgment on that verdict. Accordingly, the text of the statute does not compel the construction that a second or subsequent conviction occurs when a defendant is charged in one indictment with more than one section 924(c) offense and a single judgment of conviction is entered on that indictment. Given the impossibility of discerning a plain meaning of "second or subsequent conviction" from the language of the statutory phrase, we conclude that the phrase is ambiguous.

When the plain language of the statute does not unambiguously reveal its meaning, we turn to the legislative history. *See Blum v. Stenson*, 465 U.S. 886, 896 (1984). The legislative history regarding section 924(c) is sparse.

> "[Section] 924(c) was offered as an amendment on the House floor by Representative Poff, and passed on the same day. Accordingly, the committee reports and congressional hearings to which we normally turn for aid in these situations simply do not exist, and we are forced in consequence to search for clues to congressional intent in the sparse pages of floor debate that make up the relevant legislative history."

Busic v. United States, 446 U.S. 398, 405 (1980) (citations omitted).

One of the few relevant statements made with respect to the language in question is the following observation by Representative Poff, one of section 924(c)'s sponsors. He stated that the intended effect of the provision's minimum mandatory penalty was

> "to persuade the man who is tempted to commit a Federal felony to leave his gun at home. Any such person should understand that if he uses his gun and *is caught and convicted, he is going to jail.* He should further understand that *if he does so a second time, he is going to jail for a longer time.*"

114 Cong. Rec. 22231 (daily ed. July 19, 1968) (emphasis added). Representative Rogers echoed Poff's statement: "[A]ny person who commits a crime and uses a gun will know that he cannot get out of serving a penalty in jail. And if he does it a second time, there will be a stronger penalty." *Id.* at 22237. As with the statutory language itself, these isolated statements could support either of two equally plausible meanings. In our judgment, however, the legislators' repeated reference to committing a section 924(c) crime "a second time" does not compel a particular interpretation of "second or subsequent *conviction.*"

Thus, "[n]either the wording of the statute nor its legislative history points clearly to either meaning. In that circumstance, the Court applies a policy of lenity and adopts the less harsh meaning." *Ladner v. United States*, 358 U.S. 169, 177 (1958); *see also Bifulco v. United States*, 447 U.S. 381, 387 (1980); *United States v. Bass*, 404 U.S. 336, 347-48 (1971); *United States v. Freisinger*, 937 F.2d 383, 391 (8th Cir. 1991) (construing ambiguous language in 924(c)(1) in defendant's favor in different context); *United States v. Chalan*, 812 F.2d 1302, 1317 (10th Cir. 1987) (same). This principle is equally applicable in construing sentencing provisions. *See, e.g., Hughey v. United States*, 110 S. Ct. 1979, 1985 (1990).

Application of the rule of lenity is particularly appropriate in this case. As we have pointed out, "[s]econd and subsequent offense statutes are admittedly harsh and must be strictly construed to avoid and protect against unintended applications." *Rogers v. United States*, 325 F.2d 485, 487 (10th Cir. 1963), *reversed on other grounds and remanded for resentencing*, 378 U.S. 549 (1964); *see also Gonzales v. United States*, 224 F.2d 431, 435 (1st Cir. 1955).

> "While in common parlance a verdict of guilty is said to be a conviction, it must be given its strict legal meaning when a second offense is made a distinct crime, carrying with it heavier penalties. The authorities overwhelmingly establish, first, that in the legal sense a conviction is a judgment on a plea or verdict of guilty; second, a second offense, carrying with it a more severe sentence, cannot be committed in law until there has been a judgment on the first; third, the indictment, charging the accused of being a second offender, must set forth the fact of the prior conviction, as that is an element of the offense in the sense that it aggravates the offense described in the indictment, and authorizes the increased punishment."

Singer v. United States, 278 F. 415, 420 (3rd Cir.), *cert. denied*, 258 U.S. 620 (1922). It is clear that, as did the statute at issue in *Singer*, section 924(c) creates distinct offenses rather than being merely a sentencing enhancement provision. *See Simpson v. United States*, 435 U.S. 6, 10 (1978); *United States v. Adams*, 771 F.2d 783, 787 (3d Cir.) (construing Special Dangerous Offender Act and distinguishing *Singer* as concerning statute creating second distinct offense), *cert. denied*, 474 U.S. 1013 (1985). Thus,

the same principles of lenity and strict construction apply here that were applicable in *Singer*. We are not at liberty to interpret section 924(c) "so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner*, 358 U.S. at 178.

Although we have focused only on the statutory language and its legislative history thus far in our attempt to ascertain congressional intent, the Supreme Court has indicated that reference to other statutes may be appropriate as well. *See, e.g., United States v. American Trucking Ass'ns*, 310 U.S. 534, 543-44 (1940). In *American Trucking*, the Court interpreted the Motor Carrier Act of 1935 in light of the Hours of Service Act, the Motor Vehicle Act, the laws governing the Civil Aeronautics Authority, and the subsequently enacted Fair Labor Standards Act. Significantly, the Court in *American Trucking* was "especially hesitant" to interpret the clause in question in a way that would deviate from the meaning of other related statutes because it was adopted as a floor amendment. *See* 310 U.S. at 546-47. In *Dickerson*, the Court likewise turned to related federal statutes and their legislative history. *See* 460 U.S. at 117-18.

These authorities support an interpretation of section 924(c) that is informed by the numerous statutes requiring the enhancement of a sentence because of the commission of a subsequent offense. Congress has enacted many statutes providing for enhancement on the basis of the *commission* of a second offense *after* a prior *conviction*. *See, e.g.*, 18 U.S.C. § 3575(e) (1988) (special offender statute); 21 U.S.C. § 841(b)(1) (1988) (commission of drug crime after prior drug convictions); 21 U.S.C. § 844 (a) (1988) (simple possession of drugs after two or

more prior convictions); 21 U.S.C. § 845(a) (engaging in continuing criminal enterprise after prior conviction); 21 U.S.C. § 859(b) (1988) (distributing drugs to minor after prior conviction); 21 U.S.C. § 860(b) (1988) (distributing or manufacturing drugs near school after prior conviction); 21 U.S.C. § 861(c) (1988) (employing minors to violate drug laws after prior conviction). The government has not pointed us to any federal enhancement statute in which a prior conviction was not required.

Moreover, in 28 U.S.C. § 994(h), Congress addressed the promulgation of sentencing guidelines applicable to defendants categorized as career offenders. Such defendants were there defined as those who, inter alia, had "previously been convicted of two or more prior felonies." *Id.* § 994(h)(2). The sentencing guideline implementing this directive, section 4B1.2(3), states that "[t]he term 'two prior felony convictions' means [that] the defendant committed the instant offense subsequent to sustaining at least two felony convictions." The guideline further states that the "date that a defendant sustained a conviction shall be the date the judgment of conviction was entered," thus precluding a conviction arising from the same indictment as the offense of conviction to be counted as a 'prior felony' for purposes of placing the defendant in the career offender category. *Id.*

We find particularly significant the sentence enhancement statute pertaining to illegally importing and exporting drugs, which doubles the otherwise authorized punishment in the case of a "second or subsequent *offense*." *See* 21 U.S.C. § 962(a) (1988) (emphasis added). Congress in that instance specifically stated that "[for purposes of this section, a person shall be considered convicted of a second or subsequent offense if, prior to the commission of such

offense, one or more prior convictions of him under [laws relating to drugs] have become final." *Id.* § 962(b).

Finally, construing "second or subsequent conviction" to require that the offense underlying that conviction be committed after a defendant has received a judgment of conviction on the prior offense implements the legislative purpose upon which all such subsequent-offense statutes are grounded. These statutes were the subject of early attacks on the basis of double jeopardy. Defendants argued that the increased severity of the sentence for the second offense was in effect a second punishment for the first offense. In rejecting this argument, the Supreme Court stated that rather than punishing the defendant again for the first offense, "the statute 'imposes a higher punishment for the same offense upon one who proves, by a second or third conviction, that the former *punishment* has been inefficacious in doing the work of reform, for which it was designed.'" *Moore v. Missouri*, 159 U.S. 673, 677 (1895) (emphasis added). The purpose and construction of subsequent-offender statutes was also considered at length in *Gonzales*, 224 F.2d 431. The court there considered whether a prior conviction must occur before the commission of the subsequent offense in the context of the particular statute and facts before it. However, its discussion of the purpose to be achieved by these types of statutes generally, and the construction which this purpose requires, is equally relevant here. The court pointed to the Supreme Court's language in *Moore* that we have quoted above as recognizing that "the reformation and retribution theories of punishment [are] the primary reasons for imposing greater penalties on the repeater." *Id.* at 433. The court reasoned that

> "if subsequent offender statutes are intended to reform the offender and deprive him by reason of his incarceration of the opportunity for continued criminal conduct, then such statutes would seem to apply properly only to offenders convicted prior to the subsequent offense, for the repetition of criminal activity after conviction would show *the inadequacy of a first-offender penalty to perform this function and the need of increased penalties.*"

Id. (emphasis added).

We find this logic persuasive. A statute designed to punish a second offender more severely when he has not learned from the penalty imposed for his prior offense should not be construed to apply before that penalty has had the chance to have the desired effect on the offender. We thus conclude that the primary purpose of subsequent offense legislation "would be served best by applying the statutes only to those offenders who have been convicted prior to the commission of the subsequent offense." *Id.* at 434. Our conclusion is bolstered by the previously quoted statements of Rep. Poff concerning the effect he intended this provision to have. *See* supra at 9.

In sum, we conclude that section 924(c) must be strictly construed. Moreover, because the text of the statute and its legislative history reveal an ambiguity concerning the construction Congress intended to give the words "second or subsequent conviction," we must apply the rule of lenity. Under this rule, the words "second or subsequent" mean events that are chronologically sequential, and "conviction" means judgment of conviction. Accordingly, we hold that a defendant may not receive an enhanced sentence under section 924(c) for a second or subsequent conviction unless

the offense underlying this conviction took place after a judgment of conviction had been entered on the prior offense. We believe this construction is mandated by the applicable rules of statutory construction, is consistent with the other subsequent-offense statutes enacted by Congress, and best effectuates the purpose underlying such statutes generally.

We recognize that our holding is in conflict with *United States v. Rawlings*, 821 F.2d 1543 (11th Cir.), *cert. denied*, 484 U.S. 979 (1987), and those circuits that have followed the reasoning of that case. *See United States v. Raynor*, 939 F.2d 191, 193-94 (4th Cir. 1991) (agreeing with *Rawlings* and holding that section 924(c) enhancement applies to defendant charged with two counts in same indictment); *United States v. Nabors*, 901 F.2d 1351, 1358-59 (6th Cir.) (relying on "reasoning in *Rawlings*" to conclude that two separate 924(c) offenses charged in same indictment support enhanced sentences), *cert. denied*, 111 S. Ct. 192 (1990); *United States v. Foote*, 898 F.2d 659, 668 (8th Cir.) (agreeing with holding and reasoning of *Rawlings*), *cert. denied*, 111 S. Ct. 112 (1990); *United States v. Bennett*, 908 F.2d 189, 194 (7th Cir.) (same), *cert. denied*, 111 S. Ct. 534 (1990); *see also United States v. Bernier*, 954 F.2d 818 1992 WL 8248 (2d Cir. Jan. 22, 1992) (per curiam) (noting holding in *Rawlings* line of cases and reaching same result). However, as discussed above, we simply cannot agree with those courts that the language and legislative history unambiguously demand the harsh construction those courts impose.[4]

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[4] The court in *Rawlings* observed that the habitual offender statute, 18 U.S.C. § 3575, specifically defined a special offender as one who has previously been convicted . . . [and] "imprisoned prior to the [instant] felony." Based on this ob-

We find significant their failure to recognize that section 924(c) must be construed strictly, and that the section contains a patent ambiguity arising from the undefined term "conviction." It is clear to us that at a minimum, a "second or subsequent conviction," strictly construed, requires more than one judgment of conviction, thus precluding the result reached in those cases.

Accordingly, we hold that Abreu and Thorr ɔrugh were improperly given enhanced sentences for second or subsequent convictions under section 924(c). Such an enhanced sentence is only proper when the underlying offense has been committed after a judgment of conviction on the prior section 924(c) offense. The enhanced sentences under section 924(c) in both cases are REVERSED and the cases are REMANDED for resentencing. For a disposition of the remaining arguments raised individually by each appellant, we direct attention to the panel opinions in those cases.

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servation, the *Rawlings* court concluded that where Congress intended to provide for enhancement on the basis of previous convictions, it did so explicitly. *United States v. Rawlings*, 821 F.2d at 1546. We do not find this argument persuasive given that section 924(c) was a floor amendment offered and passed on the same day.

We also disagree with the court's statement in *United States v. Raynor*, 939 F.2d at 194, that Congress's failure to specifically define "second or subsequent conviction" with respect to section 924(c) requires us to construe that section differently from the congressionally mandated construction in 21 U.S.C. § 962(b), *see* supra at 13-14. An equally plausible argument can be made that by using the word "conviction" in section 924(c), instead of the word "offense" used in section 962(a), Congress intended the same construction for both provisions without the necessity of a definitional provision in section 924(c) comparable to that in section 962(b).

BRORBY, Circuit Judge, dissenting, joined by TACHA and BALDOCK, Circuit Judges.

Certainly more futile exercises exist than dissenting, but at the moment I can think of none. Nevertheless, the conclusion reached by the majority compels my comment by way of dissent.

The two cases decided are legally identical. Each defendant committed multiple offenses, Thornbrugh having a propensity to commit bank robberies and Abreu a propensity to commit drug offenses. Both defendants utilized firearms in the perpetration of their multiple crimes. Ultimately, each was apprehended, charged with the multiple offenses in a single indictment and convicted of multiple felonies.

At sentencing, the district court applied 18 U.S.C. § 924(c), which reads: "In the case of his second or subsequent conviction . . . such person shall be sentenced to . . . ." Thus, the district court enhanced each defendant's sentence for the second conviction which the jury returned simultaneously with the first conviction.

The sole issue to be decided is whether § 924(c) mandates an enhanced sentence when a defendant is convicted of two or more distinct § 924(c) offenses when the offenses are charged in the same indictment.

The majority rejected the analysis employed by all six circuits that have previously considered the question presented. Instead, the majority concluded the statute was ambiguous, applied the rule of lenity, and held the statute applies only when the *commission* of a second offense is preceded by the entry of a judgment of conviction. The majority has thus rewritten 18 U.S.C. § 924(c) to read:

> Whoever, having been previously charged and convicted under 924(c) which conviction is evi-

> denced by the entry of a judgment of conviction, then commits another § 924(c) offense shall be sentenced to . . . .

All six of the circuits that have previously considered this question have decided the statute is not ambiguous and have held a second conviction charged in the same indictment as the first triggers the enhancement provision of § 924(c).[1] The analysis employed by the Fourth Circuit in *United States v. Raynor*, 939 F.2d 191 (4th Cir. 1991), is illustrative. The *Raynor* court said:

> The plain meaning of the statute supports the conclusion that a conviction on a second firearms count, even though charged in the same indictment as the first, gives rise to the enhanced sentence. The statute directs enhancement for a "second or subsequent conviction." The second conviction is the one that follows the first, either in time or in a number sequence, and the subsequent conviction is any that follows the second, either in time or in a number sequence. The enhancement that is mandated by the statute does not depend on satisfying conditions that the second or subsequent conviction be by reason of a different indictment, or that the sentence be imposed on the first conviction before the enhancement can apply to the second, or that the defendant have served the sentence on the first. To construe the statute with such conditions would interject terms not included, and surely not intended, by Congress.

Id., at 193. I am persuaded by this reasoning.

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[1] The majority opinion cites to these decisions.

Our six sister circuits have likewise delved into the collateral issues including the legislative history, Congressional intent, Sentencing Guidelines, rules of statutory construction and analogous cases, and have come to the opposite conclusion from that enunciated by our majority. I embrace the reasoning and analysis as set forth by our sister circuits. I can add nothing to their analysis.

The majority's application of the rule of lenity deserves special comment. A statute is not deemed ambiguous "for purposes of lenity merely because it [is] possible to articulate a construction more narrow than that urged by the Government." *Moskal v. United States*, —— U.S. ——, 111 S. Ct. 461, 465 (1990). Instead, lenity is reserved "for those situations in which a reasonable doubt persists about a statute's intended scope." *Id.* The rule of lenity applies only " 'at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.' " *Chapman v. United States*, —— U.S. ——, 111 S. Ct. 1919, 1926 (1991) (quoting *Callanan v. United States*, 364 U.S. 587, 596 (1961), and citing *Moskal*). The majority has, in effect, decided that § 924(c) is draconian and meant to apply only to a recidivist. This reasoning has driven the majority into the corral formed by *Moskal* and *Chapman*.

The fatal flaw in the majority's analysis may best be illustrated by a hypothetical factual scenario. Suppose a defendant commits two separate and distinct § 924(c) violations one year apart. Subsequently, he is apprehended and convicted of the first. Under the majority's holding, once the second crime is solved and defendant is charged and convicted, his sentence may not be enhanced because the commis-

sion of the second crime occurred prior to his conviction for the first. Even more extreme would be the defendant who escapes during his trial and commits a second § 924(c) offense prior to the entry of the judgment of conviction. Neither could his sentence for a second conviction be enhanced. But if the majority employed a plain language analysis to § 924(c), sentence enhancement would apply under either scenario.

Assuming, arguendo, the majority is correct in concluding § 924(c) may be read in more than one way, it is still impossible to reach the interpretation they suggest. The only other logical way to read this statute is that it requires the second or subsequent conviction to be charged in an indictment separate from the first. As the Fourth Circuit has aptly pointed out, reading that requirement into § 924(c) does nothing more than require prosecutors to go through the additional ministerial task of charging repeat offenders in separate indictments. *See Raynor*, 939 F.2d at 193. The only legitimate interpretation remaining allows a second or subsequent conviction charged in the same indictment as the first to trigger the enhancement provisions of § 924(c).

If you pump enough water into a dry creek it becomes a river. The majority has pumped sufficient conditions into § 924(c) to transform it into a lenient vehicle for wrongdoers to ride.

I would affirm the enhanced sentences given to Mr. Abreu and Mr. Thornbrugh for their second and subsequent convictions.

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 89-4145

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ORESTES LUCIANO ABREU, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the District of Utah
(D.C. No. 88-CR-060S)

[Filed Apr. 13, 1992]

Before SEYMOUR and EBEL, Circuit Judges, and BROWN,* District Judge.

EBEL, Circuit Judge.

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* Honorable Wesley E. Brown, Senior District Judge for the District of Kansas, sitting by designation.

Appellant Orestes Luciano Abreu appeals his conviction and sentencing for various drug trafficking and weapons offenses. He raises eleven issues on appeal. We affirm the district court on all issues except for appellant's enhanced sentence for a second or subsequent conviction under section 924(c)(1). As to that sentence, we vacate and remand for resentencing pursuant to the en banc opinion in this case issued concurrently with this panel decision.

Facts

Appellant Orestes Luciano Abreu [1] was arrested in Salt Lake City along with his "nephew" and co-defendant, Juan Carlos Alvarez, who allegedly served as Abreu's interpreter and partner. The two had been the targets of a long-standing undercover narcotics investigation. Following the arrest, and under the authority of a search warrant, government officials entered defendants' Salt Lake City apartment and uncovered approximately 641 grams of a white powdery substance in a kitchen cabinet. The substance was subsequently tested and found to contain cocaine. In addition to the white powder, officials seized a scale, grinder, and plastic bags from under the kitchen sink, along with a triple beam balance scale commonly used by narcotics traffickers to weigh their drugs. A search of Abreu's bedroom uncovered a semi-automatic rifle, a .38 caliber Colt revolver containing three bullets, and ammunition for the rifle.

Abreu eventually was indicted for violations of 21 U.S.C. § 846 (conspiracy to possess and distribute

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[1] Appellant's Brief refers to appellant as Mr. Abrue. However, the notice of appeal, R. Vol. I, doc. 130, and all prior documents refer to defendant as Mr. Abreu. For consistency's sake, we will refer to defendant as Mr. Abreu, though we are mindful that the proper spelling may be A-B-R-U-E.

cocaine), 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (possession with intent to distribute cocaine and aiding and abetting therein), 21 U.S.C. § 846 (conspiracy), and four counts of 18 U.S.C. § 924(c)(1) (use of a firearm during a drug trafficking crime). He was subsequently charged with violating 18 U.S.C. § 3146 for failing to appear after attempting to escape from a Mississippi halfway house before trial. Abreu pled guilty to the last of these charges and was convicted on all others following a jury trial. At the trial, his former partner Alvarez testified for the government. The district court eventually sentenced Abreu to a total of 380 months incarceration: 200 months on the drug possession charge and 200 months on the conspiracy charge, to run concurrently, plus 60 months for one gun charge and an enhanced 120 month sentence for the 'second or subsequent' gun conviction, both to run consecutively following the service of the first 200 months. In addition, Abreu was sentenced to 18 months on the failure to appear charge, to run concurrently with the other sentences. Abreu now appeals his conviction and sentencing and raises eleven issues for our review. We consider each in turn.

I. Does Appellant's Conviction Under 21 U.S.C. § 841(a)(1) Violate the Eighth Amendment?

Appellant maintains that the mandatory minimum punishment prescribed by the Armed Career Criminal Act, 21 U.S.C. § 841(a)(1), violates his rights under the Eighth and Fourteenth Amendments. Specifically, appellant contends that (1) the mandatory minimum sentence deprived him of "individualized" sentencing, and (2) the mandatory minimum sentence is so grossly disproportionate as to be cruel and unusual under the test set forth in *Solem v. Helm*,

463 U.S. 277 (1983). We find no merit to these claims.

Since the filing of this appeal, the Supreme Court handed down its opinion in *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991), which upheld a mandatory life imprisonment sentence without possibility of parole for conviction of possession of more than 650 grams of cocaine. Although the Court was split in its reasoning, it is clear from the various opinions generated in that case that mandatory sentences are permissible for non-capital punishment. Thus, *Harmelin* discredits appellant's argument that his mandatory minimum sentence is unconstitutional because it deprives him of "individualized" sentencing.

Turning to appellant's proportionality argument, we likewise find no Eighth Amendment problem. Although a majority of the Court in *Harmelin* held that the constitution does impose a proportionality requirement on non-capital sentences,[2] considerable latitude is to be given to the legislature or Congress in setting sentences. The appellant is correct in asserting that "[t]he Armed Career Criminal Act calls for

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[2] Although the *Harmelin* Court upheld the sentence by a 5-4 vote, the majority was split on the appropriateness of the "proportionality" principle in non-capital cases. Justice Scalia, joined by Chief Justice Rehnquist, argued that "*Solem* [*v. Helm*, 463 U.S. 277 (1983)] was simply wrong; the Eighth Amendment contains no proportionality guarantee." *Harmelin*, 111 S. Ct. at 2686. Justice Kennedy, joined by Justices O'Connor and Souter, concluded that the "Eighth Amendment proportionality principle also applies to non-capital sentences" but found that "our proportionality decisions . . . require us to uphold petitioner's sentence." *Id.* at 2702. The dissenters argued that "the statutorily mandated punishment at issue here . . . fails muster under *Solem* and, consequently, under the Eighth Amendment to the Constitution." *Id.* at 2716.

a mandatory minimum punishment which is greater than the maximum term imposed on many persons convicted of homicide," Appellant's Brief at 18. However, the Supreme Court has upheld similarly severe sentences for drug offenses. For example, in *Hutto v. Davis*, 454 U.S. 370 (1982), the Supreme Court rejected an Eighth Amendment challenge to a prison term of 40 years and fine of $20,000 for possession and distribution of approximately nine ounces of marijuana. Similarly, in *Harmelin*, the Court upheld a life sentence with no possibility of parole for a defendant convicted of possession of slightly more than 650 grams of cocaine.

In the case at hand, appellant was convicted for possession of 641 grams of cocaine. Although appellant contends that the mixture seized was of low concentration and virtually "unmarketable," 21 U.S.C. § 841 does not require any degree of drug purity for a conviction. We think it is clear that the sentence at issue here is constitutionally sound. Although the ten-year minimum prescribed by § 841 is indeed a harsh penalty, it hardly compares to a life sentence without parole as was at issue—and upheld—in *Harmelin*. We therefore reject appellant's proportionality argument.

II. Was There Sufficient Evidence to Support a Finding of Possession Under 21 U.S.C. § 841 (a)(1)?

Appellant contends that there was insufficient evidence to support a finding of cocaine possession—one of the elements of a § 841(a)(1) charge. According to appellant, "[s]howing that one is present in the proximity of a cache of drugs is not sufficient to demonstrate constructive possession, nor is the fact that the person accused habited the apartment where the drugs were found sufficient to impute construc-

tive possession." Appellant's Brief at 20. We conclude that "constructive possession" is not an element of a § 841(a)(1) charge where, as here, appellant was charged under the aiding and abetting statute, 18 U.S.C. § 2. We therefore reject appellant's claim.

In this case, appellant was indicted and subsequently convicted of

> knowingly and intentionally . . . possess[ing] with intent to distribute in excess of ½ kilogram of a mixture containing cocaine, a Schedule II narcotic drug controlled substance, all in violation of Section 841(a)(1) of Title 21, United States Code, and *Section 2 of Title 18, United States Code*, with penalties as provided in Title 21, United States Code, Section 841(b)(1)(B).

R. Vol. I, Doc. 90 at 3 (emphasis added). According to 18 U.S.C. § 2, a defendant may be charged as a principal in the commission of a substantive criminal offense whenever he "aids, abets, counsels, commands, induces or procures its commission . . . ." In order to prove a crime of aiding and abetting, the government must prove that the defendant associated with the criminal venture, that he purposefully participated in it, and that he sought by his action to bring it about. *United States v. Vaden*, 912 F.2d 780, 783 (5th Cir. 1990); *United States v. Medina*, 887 F.2d 528, 532 (5th Cir. 1989).

Here, there was sufficient evidence for the jury to conclude that appellant aided and abetted Alvarez in the commission of the 841(a) offense. As we noted in *United States v. Culpepper*, 834 F.2d 879 (10th Cir. 1987), "[e]vidence is considered sufficient to support a criminal conviction if, when viewed in the light most favorable to the government, a reasonable jury could find the defendant guilty beyond a rea-

sonable doubt." *Id.* at 881 (citation omitted). We think it was perfectly reasonable for the jury to conclude that appellant associated with the criminal venture, that he purposefully participated in it, and that he sought by his actions to bring it about.

In any event, we also conclude that there was sufficient evidence to support a finding of constructive possession on the part of appellant. As we noted in *Culpepper*, knowing exercise of dominion and control over the narcotics constitutes constructive possession, and constructive possession may be joint among several individuals. *Id.* The fact that the cocaine was found in appellant's apartment, coupled with the testimony of Alvarez and various law enforcement officers, supports the conclusion that appellant constructively possessed the cocaine. We therefore affirm the conviction for possession with intent to distribute cocaine.

III. Was There Sufficient Evidence To Support a Conviction for Conspiracy?

Appellant maintains that the prosecution must show, "by a preponderance of the evidence, *independent of the co-conspirator's statement*, that a conspiracy existed, and that the co-conspirator and the defendant were members of the conspiracy." Appellant's Reply Brief at 1 (emphasis in original). According to appellant, the government relied entirely on the statements of Alvarez—the alleged co-conspirator—without offering any independent proof of the conspiracy. Thus, appellant concludes that Alvarez' statements should have been excluded and the conviction overturned.

We reject appellant's argument. The cases cited by appellant—for example, *United States v. Silverman*, 861 F.2d 571, 576-80 (9th Cir. 1988), and *United States v. Paris*, 812 F.2d 471, 475-76 (9th Cir. 1987)

—involved the admission of a co-conspirator's *out-of court* statements. In both *Silverman* and *Paris*, the Ninth Circuit merely stated that a co-conspirator's out-of-court statements, standing alone, are insufficient to establish that defendant had knowledge of and participated in a conspiracy. In this case, however, Alvarez testified *directly* and extensively at appellant's trial as a government witness. Thus, he was at all times available for cross-examination by appellant.

Moreover, to the extent that the government did make use of some hearsay evidence—Captain Stuart Smith testified about several telephone conversations he and a government informant had with Alvarez—appellant at no time objected to the evidence on hearsay grounds. This being so, we may not reverse the district court unless the admission of such evidence was plain error. *See* Fed. R. Crim. P. 52(b). Since the co-conspirator whose declarations are in question was a government witness at trial, subject to full cross-examination by appellant on all relevant issues—including the comments referred to in Captain Stuart's testimony—we cannot say that the admission of such hearsay testimony seriously affected the fairness, integrity, or public reputation of appellant's judicial proceedings.

Finally, after reviewing the record, we find that there was indeed independent evidence to support appellant's conspiracy conviction. For example, we refer to evidence of an intercepted mailing between Harold Jackson, a known drug purchaser, and appellant containing $14,000 in cash. R. Vol. VI at 8-12. Although appellant offered an explanation for this evidence, we cannot say that it was unreasonable for the jury to conclude that appellant was a conspirator in the effort to traffic drugs between Florida and Salt Lake City.

IV. Are Conspiracy to Distribute Cocaine (21 U.S.C. § 846) and Possession of Cocaine with Intent to Distribute (21 U.S.C. § 841) "Drug Trafficking Crimes" as Contemplated by 18 U.S.C. § 942(c)?

According to 18 U.S.C. § 924(c)(1), "[w]hoever, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years . . . . In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for ten years." [3] Appellant maintains that neither of his drug charges was sufficient to trigger a § 924 weapons charge. This is a fanciful and incorrect interpretation of both the statute and Tenth Circuit caselaw.

According to § 924(c)(2), as it existed at the time of the offenses in question, a drug trafficking crime means "any violation of Federal law involving the distribution, manufacture, or importation of any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))." [4] We believe that both the possession and conspiracy charges brought against defendant fit that definition of "drug trafficking crime." We note that such

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[3] This section has since been amended, such that a second or subsequent conviction under this subsection now carries a twenty-year mandatory sentence.

[4] This section has since been amended to define drug trafficking crime as any "felony punishable under the Controlled Substances Act (21 U.S.C. § 801 et seq.). . . ." The Controlled Substances Act includes both §§ 841 and 846—the two drug offenses brought against appellant here.

charges have been used routinely as the basis for § 924(c) charges in the past. *United States v. McKinnell*, 888 F.2d 669, 674 (10th Cir. 1989) ("Possession of a controlled substance with intent to distribute . . . is a valid predicate offense for section 924(c)(1)"); *see United States v. Cardenas*, 864 F.2d 1528, 1529 (10th Cir.) (section 846 and 841 (a)(1) convictions triggered § 924(c) conviction), *cert. denied*, 491 U.S. 909 (1989). Since we are aware of no cases to the contrary, and since appellant's position seems contrary to common sense and common practice, we categorically reject appellants' contention that "neither of [the] offenses is sufficiently 'involved' with the dist[ribution], manufacture, or importation of cocaine so as to bring them within the definitional provisions of 18 U.S.C. [§] 924(c)(2)." Appellant's Brief at 22.

V. Was There Sufficient Evidence to Support Appellant's Conviction for "Use" of a Firearm During a Drug Trafficking Crime?

Appellant next contends that there was no evidence to suggest that the firearms seized from his apartment were "used" or "carried" during or in relation to the alleged drug trafficking crimes, as required under § 924(c). He argues that "[b]oth 'uses' and 'carries' . . . are active verbs implying direct physical action," Appellant's Brief at 26, and that mere possession is insufficient to support a conviction under the statute. He further argues that there was never any evidence presented at trial as to who controlled the guns—himself or Mr. Alvarez.

As noted above, appellate review of this issue requires the court to consider, in the light most favorable to the prosecution, all the evidence presented at trial and any reasonable inferences drawn therefrom.

United States v. Frank, 901 F.2d 846, 848 (10th Cir. 1990). Based on our thorough review of the record, we think there was sufficient evidence to support the convictions.

The Tenth Circuit, like most other circuits, has recognized that

> a defendant can "use" a firearm within the meaning of § 924(c)(1) without firing, brandishing, or displaying it. . . . [T]he "uses" element of § 924(c)(1) is met when the defendant *has "ready access" to the firearm and the firearm "was an integral part of his criminal undertaking and its availability increased the likelihood that the criminal undertaking would succeed."*

McKinnell, 888 F.2d at 674-75 (emphasis added) (citations omitted). In this case, the firearms at issue were found in appellant's bedroom, in the same apartment where over half a kilogram of cocaine mixture was stored. Many circuits have held that this kind of physical proximity, coupled with the understanding that guns have become tools of the drug trade, is enough to support a jury's inference that the guns played an integral role in appellant's criminal enterprise. *See United States v. Torres*, 901 F.2d 205, 241-46 (2d Cir.) (gun stored under mattress in a room containing drugs could reasonably be considered an integral part of defendant's criminal undertaking since it might have served to protect the cocaine and cash stored in the apartment), *cert. denied*, 111 S. Ct. 273 (1990); *United States v. Alvarado*, 882 F.2d 645, 653-54 (2d Cir. 1989) (jury could reasonably infer that guns locked in safe were there to protect money and drugs in the event drug deal went sour, thus implicating § 924(c)(1)), *cert. denied*, 110

S. Ct. 1114 (1990); *United States v. Matra*, 841 F.2d 837, 839, 841-43 (8th Cir. 1988) (not unreasonable to infer that machine gun hidden under frame of waterbed served to protect defendant's cocaine and cash and was therefore "used" in relation to drug trafficking crime); *United States v. LaGuardia*, 774 F.2d 317, 319-20 (8th Cir. 1985) (evidence of weapons found with cocaine and cash sufficient to support jury finding of § 924(c) violation, even though some of the weapons were not in the actual possession of the defendant).

In *United States v. Martinez*, 912 F.2d 419, 420 (10th Cir. 1990), this court upheld a § 924(c)(1) conviction where the police "found an unloaded revolver, currency, and over $40,000 worth of cocaine in a closed briefcase in" defendant's room. The court cited a string of cases from other circuits upholding similar convictions. *E.g.*, *United States v. Munoz-Fabela*, 896 F.2d 908, 911 (5th Cir.) ("It is enough that the firearm was present at the drug-trafficking scene, that the weapon could have been used to protect or facilitate the operation, and that the presence of the weapon was in some way connected with drug trafficking."), *cert. denied*, 111 S. Ct. 76 (1990).

In this case, the presence of the weapons at the scene was bolstered by testimony that appellant and his "partner" had been previously robbed of their cocaine. That, plus the fact that the weapons were displayed to at least one cocaine customer, supports the inference that the guns were an integral part of appellant's criminal undertaking, used to protect both money and drugs. Although there was testimony presented at trial for the proposition that the guns were obtained from drug purchasers merely as collateral for future payments, we cannot say that it was unreasonable for a jury to infer that appellant used the

weapons to facilitate his drug trade. This is especially true in light of the fact that appellant retained possession of the weapons for at least three months and was carrying another weapon at the time of his arrest. Appellant's insistence that there was no evidence presented at trial as to who controlled the guns —both Mr. Alvarez and appellant lived in the same apartment—is unpersuasive. Fingerprint evidence established that appellant handled at least two of the ammunition clips for the Mini-14 rifle. In addition, Mr. Alvarez' testimony gave the jury sufficient grounds on which to base their conclusion that appellant did in fact control the weapons.

We therefore find that it was not unreasonable for the jury to conclude, as it did, that appellant used the weapons in the commission of a drug trafficking offense.

VI. Was Appellant Improperly Sentenced on Multiple Convictions When They All Related to a Single Criminal Episode?

Appellant was sentenced on four separate counts: one count for possession with intent to distribute cocaine and aiding and abetting therein; one count for conspiracy to possess cocaine within intent to distribute; and two counts for use of a firearm during a drug trafficking crime. He now maintains that it was error to charge and sentence him separately when all counts arose out of the same criminal episode. The government counters that possession with intent to distribute and conspiracy to distribute cocaine are separate crimes, each requiring an element the other does not. The government further argues that the separate gun convictions were proper since each alleged a violation involving a single fire-

arm used in relation to a single and separate drug trafficking crime.

In *United States v. Henning*, 906 F.2d 1392, 1399 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 789 (1991), we held that "where a defendant has been convicted of a single drug trafficking offense and more than one firearm was involved, a single violation of § 924 (c)(1) occurs and multiple consecutive sentences may not be stacked to account for each firearm seized." Obviously the district court was mindful of *Henning* when it sentenced appellant on just two of the four § 924(c)(1) convictions. However, in evaluating appellant's sentence, we must now decide whether two consecutive sentences under § 924(c) may be applied where a defendant has been convicted of *two* drug trafficking offenses which arise out of the same criminal episode or operative facts and where a different gun is paired with each drug trafficking offense. Although several other circuits have endorsed the assessment of multiple § 924(c) penalties to separate underlying offenses charged in the same indictment, none of these cases confronted the specific facts facing us here. *See United States v. Bennett*, 908 F.2d 189, 194-95 (7th Cir.), *cert. denied*, 111 S. Ct. 534 (1990); *United States v. Foote*, 898 F.2d 659, 668-69 (8th Cir.), *cert. denied*, 111 S. Ct. 112, *cert. denied*, 111 S. Ct. 342 (1990); *United States v. Rawlings*, 821 F.2d 1543, 1545-46 (11th Cir.), *cert. denied*, 484 U.S. 979 (1987). Rather, each involved several "distinct" transactions, "occurr[ing] on . . . different dates and . . . requir[ing] proof of different sets of facts." *Bennett*, 908 F.2d at 194. In resolving this case of first impression, we look for guidance to our own case of *United States v. Chalan*, 812 F.2d 1302, 1315-17 (10th Cir. 1987), *cert. denied*, 488 U.S. 983 (1988), in which

we held that multiple firearms counts are proper if the underlying multiple offenses do not constitute a single offense for double jeopardy purposes.

In *Chalan*, defendant was convicted of felony murder while committing a robbery. He was also convicted of robbery and two counts of 924(c) (use of a firearm in the commission a crime of violence). Although sentenced concurrently on the murder and robbery charges, defendant was sentenced to consecutive sentences for the weapons charges. Defendant appealed his weapons sentences, contending that the crimes underlying the 924(c) convictions were really one offense. We agreed and held that "[u]nder the *Blockburger* [*v. United States*, 284 U.S. 299 (1932),] analysis, the underlying crimes in this case constitute a single offense for double jeopardy purposes, and a single 'crime of violence' within the meaning of section 924(c)." *Chalan*, 812 F.2d at 1317.

Like the defendant in *Chalan*, the appellant here asserts that the crimes underlying his two § 924(c) sentences were in fact a "single criminal transaction." *Id.* In order to evaluate this assertion, we must apply the test set forth by the Supreme Court in *Blockburger*. According to *Blockburger*, "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger*, 284 U.S. at 304. Unlike the robbery and felony-murder charges at issue in *Chalan*, we think that the offenses charged here do in fact constitute separate offenses. As the Ninth Circuit and others have noted,

> [a]s a general rule, a substantive charge, and conspiracy charge based on the substantive charge, pass muster under the *Blockburger* test and retain their separateness. The reason for

> this is because a requirement for a conspiracy conviction is proof of an agreement which is not necessary to prove an underlying substantive count. And, conviction on the substantive count will require the consummation of the crime, which, of course, is not essential for completing the crime of conspiracy.

United States v. Wylie, 625 F.2d 1371, 1381 (9th Cir. 1980) (citations omitted), *cert. denied*, 449 U.S. 1080 (1981). The *Wylie* court concluded that "Congress did intend to allow the courts to impose consecutive sentences for conspiracy (21 U.S.C. § 846), and for substantive offenses (21 U.S.C. § 841(a)(1)), even when the proof necessary to obtain a conviction for the former was necessary to obtain a conviction for the latter offense." *Id.* at 1382 (footnote omitted). The Tenth Circuit followed the *Wylie* court in *United States v. Espinosa*, 771 F.2d 1382, 1402-03 n.27 (10th Cir.), *cert. denied*, 474 U.S. 1023 (1985), concluding that "[t]he district judge here could have sentenced defendants to consecutive sentences [on § 841 and § 846 charges]."

The fact that appellant's possession conviction was based on the aiding and abetting statute does not alter this calculus. Several circuits have held that conspiracy to commit a crime with another is a separate and distinct offense from that of aiding and abetting and involves the additional element of preconcert and connivance not necessarily inherent in the mere joint activity common to aiding and abetting. *United States v. Goff*, 847 F.2d 149, 175 (5th Cir.) ("It is well established that conspiracy to commit a crime and the crime itself are separate punishable offenses. It is also well established that conspiracy and aiding and abetting are separate punishable offenses.") (citations omitted), *cert. denied*, 488 U.S. 932

(1988); *United States v. Peterson*, 524 F.2d 167, 174 (4th Cir. 1975), *cert. denied*, 423 U.S. 925, *cert. denied*, 423 U.S. 1088 (1976); *United States v. Cowart*, 595 F.2d 1023, 1029-30 (5th Cir. 1979); *United States v. Krogstad*, 576 F.2d 22, 29 (3rd Cir. 1978); *United States v. Townes*, 512 F.2d 1057, 1058 (6th Cir.), *cert. denied*, 423 U.S. 846 (1975). The Tenth Circuit reached this very result in *United States v. Jackson*, 482 F.2d 1167, 1176 (10th Cir. 1973), *cert. denied*, 414 U.S. 1159 (1974):

> The law is well settled that commission of a substantive offense and a conspiracy to commit it are separate crimes. The substantive offense of illegally importing heroin into the United States requires no more than one person for its commission. Similarly, aiding and abetting does not require an agreement .... The essence of a conspiracy charge is an agreement to commit an offense against the United States. Whether [defendants] were convicted as principals or for aiding and abetting, it is clear their conviction does not rest on the agreement. Thus the offenses in Count One [illegal importation of heroin or aiding and abetting therein] require proof not essential to the conspiracy conviction.

[citations omitted]

Based on these holdings, we conclude that the conspiracy and possession charges were separate offenses, and therefore separate "drug trafficking crimes" within the meaning of § 924(c). Since section 924(c) imposes additional sentences for "crimes" which have been committed with a weapon, and since the drug trafficking crime statutes referenced in section 924(c)(2) acknowledge the possibility that the same act or transaction may result in the violation of two or more distinct statutory provisions, we think it was appro-

priate for the district court to sentence appellant on two separate § 924(c) charges. Such a result is consistent with *Blockburger*, *Espinosa*, and *Chalan*.

VII. Does Appellant's Sentence Violate the Eighth Amendment?

Appellant maintains that the vast disparity between his sentence and that of his co-defendant, Mr. Alvarez, constituted an Eighth Amendment violation. Appellant received a sentence of 380 months imprisonment;[5] Alvarez received only 60 months. As authority for this argument, appellant cites a Nebraska Supreme Court case (*State v. Garcia*, 345 N.W.2d 826 (Neb. 1984)). Appellant's Brief at 40.

As we noted in *United States v. Sardin*, 921 F.2d 1064, 1067 (10th Cir. 1990),

> The sentencing guidelines incorporate the principles of equality and proportionality. Their purpose is to narrow the "disparity in sentences imposed . . . for similar criminal conduct by similar offenders." Guidelines Ch. 1, Pt. A.3. The guidelines mandate the sentencing court to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). We have specifically recognized and endorsed this principle. *United States v. Jackson*, 921 F.2d 985, 987-989

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[5] We note that as a result of our en banc decision in this case, *see United States v. Abreu*, —— F.2d —— (10th Cir. Nos. 89-4145, 89-5166, 89-5337, filed April 13, 1992) (en banc), appellant's sentence on Count IV for 120 months (based on section 924(c)) is being vacated and his case is remanded for resentencing on that count to the unenhanced sentence of 60 months (five years).

(10th Cir. 1990) (en banc); *see also United States v. White*, 893 F.2d 276, 278 (10th Cir. 1990) ....

However, "[w]hile similar offenders engaged in similar conduct should be sentenced equivalently, disparate sentences *are allowed* where the disparity is explicable by the facts on the record." *United States v. Goddard*, 929 F.2d 546, 550 (10th Cir. 1991) (emphasis added) (citations omitted). In this case, appellant has failed to designate a record which would enable us to evaluate the appropriateness of his sentence. Specifically, we are unable to review the presentence report or any testimony made at the sentencing hearing. Moreover, we have virtually no information regarding the sentencing of Mr. Alvarez; we do not know the full charges contained in his indictment nor his criminal history nor the sentencing court's assessment of his cooperation and/or acceptance of responsibility.[6] That being so, we cannot say that appellant's sentence was unjustified. *See United States v. Jimenez*, 928 F.2d 356, 364 (10th Cir.), *cert. denied*, 112 S. Ct. 164 (1991). Given appellant's failure to specify the source of the disparity and the details of the record, we affirm the sentence imposed by the district court.

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[6] Alvarez' testimony at trial indicates that he pled guilty to charges of conspiracy and distribution of one-half ounce of cocaine. The government moved to dismiss all other charges and agreed to inform the sentencing court of the full extent and value of Alvarez' cooperation with the United States. No more information could be gleaned from the record. R. Vol. III at 48-49.

VIII. Did the Trial Court Properly Impose an Enhanced Ten Year Sentence for One of Appellant's Convictions Under 18 U.S.C. § 924(c) as a "Second or Subsequent Conviction"?

Appellant contends that the district court erred in imposing an enhanced ten-year sentence for appellant's gun conviction on Count IV pursuant to the second sentence of section 924(c)(1). We agree.

Our en banc decision in this case, handed down concurrently with this panel decision, holds that "a defendant may not receive an enhanced sentence under 924(c) for a second or subsequent conviction unless the offense underlying this conviction took place after a judgment of conviction had been entered on the prior offense." *United States v. Abreu*, —— F.2d —— (10th Cir. Nos. 89-4145, 89-5166, 89-5773, filed April 13, 1992) (en banc). Because that was not the case here, we concluded that "Abreu . . . [was] improperly given [an] enhanced sentence [] for [a] sentence or subsequent [*sic*] conviction[] under section 924(c)" *Id.* We therefore reversed appellant's enhanced sentence of ten years under Count IV and remanded for resentencing. On resentencing, the court should impose only a five-year on Count IV as is provided in the first sentence of section 924(c)(1).

IX. Should the Trial Court Have Suppressed Evidence of a 9 MM Handgun Found in Defendant's Automobile at the Time of His Arrest?

Appellant challenges the admission of evidence showing that he was in possession of a loaded pistol when arrested. The handgun was uncovered immediately after defendant had left his apartment where the cocaine and other firearms were later found by

agents executing a search warrant. After a bench conference outside of the presence of the jury, the trial court found that the evidence *was* probative as to defendant's intent, knowledge, and use of the weapons found in his bedroom. Finding that the "probative value of the evidence outweigh[ed] the prejudicial effect," R. Vol. II at 69-71, the trial court allowed the evidence. In evaluating the trial court's admission of evidence, we are bound to uphold the trial court unless we find an abuse of discretion. *See United States v. Keys*, 899 F.2d 983, 987 (10th Cir.) (decision whether to exclude evidence as being unfairly prejudicial is one for which trial judge is particularly well-suited), *cert. denied*, 111 S. Ct. 160 (1990). The trial court is given broad discretion in determining whether evidence is relevant and whether the probative value of the evidence outweighs any unfair prejudice to the defendant. We find no abuse of discretion here.

Although appellant contends that there was "never any showing that the[re] was any connection between the 9 mm. handgun and the drug trafficking charges," Appellant's Brief at 45, we believe that the handgun was indeed relevant to defendant's "possession, knowledge and ownership of the firearms found in the bedroom in the apartment." R. Vol. II at 70. Faced with almost identical circumstances in *United States v. Sullivan*, 919 F.2d 1403 (10th Cir. 1990), this court agreed with several other circuits that "firearms are generally admissible in a drug conspiracy trial because they are 'tools of the trade' for those engaged in illegal drug activity." *Id.* at 1420 (citations omitted). Although we noted that such a broad proposition must not "substitute for a more detailed case-by-case analysis under Federal Rules of Evi-

dence 401 and 403," *id.*, we were persuaded that the admission of the weapons was proper. We reach the same conclusion here.

In this case, we think the handgun may indeed have been relevant to determining whether the guns seized in the bedroom were merely collateral or protection for appellant's drug trade. Although we agree with appellant that such evidence may have carried the potential for jury prejudice, we cannot say that it was error for the district court to conclude that "the probative value of the evidence outweighs the prejudicial effect . . . ." R. Vol. II at 71. Moreover, we note that the prejudicial effect of such evidence might have been further minimized by a jury instruction limiting the use of the handgun. However, appellant never requested such an instruction, either at the time the evidence was admitted or at the conclusion of the case. He has accordingly waived this aspect of the issue. Since we cannot say that it was an abuse of discretion for the trial court to allow evidence and testmiony of the 9 mm. handgun, we affirm the trial court.

X. Should the Trial Court Have Suppressed Evidence and Testimony Concerning Appellant's Subsequent Mississippi Convictions?

Appellant maintains that the trial court erred by allowing testimony regarding appellant's subsequent possession of a controlled substance in Mississippi. He asserts that the effect of such evidence was to prejudice and to inflame the jury against him. We once again review the district court's admission of evidence under the abuse of discretion standard.

Rule 404(b) of the Federal Rules of Evidence allows for the admission of evidence of "other crimes, motive, intent, preparation, plan, or identity. Rule

404(b) does *not* specifically exclude acts subsequent to the incident or incidents giving rise to the charges in the indictment. *United States v. Hogue*, 827 F.2d 660, 663 (10th Cir. 1987). In fact, we have allowed evidence of subsequent crimes where it is similar to the crime charged or possesses some "signature quality." *United States v. Gutierrez*, 696 F.2d 753, 755 (10th Cir. 1982), *cert. denied*, 461 U.S. 909, *cert. denied*, 461 U.S. 910 (1983). In this case, the government sought to introduce testimony regarding appellant's possession of cocaine in Mississippi. The government argued that such evidence was "significant because it shows not only was the defendant in possession of a large quantity of cocaine within [the] last two months after he escaped from this jurisdiction but that he was doing so in association and in conjunction with a fellow family member of a much younger age than himself . . . in the same manner that he enlisted Mr. Alvarez." R. Vol. III at 162-63. The government asserted that the Mississippi cocaine possession was relevant to "show the defendant's plan, opportunity, knowledge and intent in regard to the current charges." *Id.* at 163. The district court agreed and held that "the evidence is relevant . . . and the probative value outweighs the prejudicial value." *Id.* at 164. We cannot say that that ruling was an abuse of discretion. Moreover, we note that the government was careful to avoid any reference to appellant's conviction on the Mississippi charges. They offered testimony only as to appellant's possession and "modus operandi" in Mississippi; it was the defense which revealed to the jury the facts of appellant's conviction. We therefore affirm the trial court's evidentiary ruling on this matter.

XI. Did the Trial Court Properly Sentence Appellant Under the Sentencing Guidelines?

Appellant finally charges that the district court misapplied the federal sentencing guidelines in imposing his sentence. Specifically, appellant contends that the district court erred in sentencing him for bringing into Utah "in excess of five kilograms of cocaine to sell or distribute." Appellant's Brief at 53. He further contends that he was wrongly sentenced as an "organizer and leader." *Id.* at 54. Lastly, appellant asserts that the district court wrongly applied the sentencing guidelines criminal history calculus. We find that the sentence imposed by the district court was appropriate.

In the first place, we note that a sentencing court may look beyond the charges alleged in the indictment in imposing a sentencing. *United States v. Smith*, 929 F.2d 1453, 1459 (10th Cir.) ("[Q]uantities and types of drugs not specified in the charge with which defendant stands convicted are to be included in determining the base offense level 'if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction.' ") (citations omitted), *cert. denied*, 112 S. Ct. 146 (1991). In this case, the evidence presented at trial adequately supported the trial court's finding that appellant had brought more than five kilograms of cocaine into Utah as part of the overall conspiracy. *See* R. Vol. IV at 68, Testimony of Alvarez. The evidence of appellant's role as an organizer and leader was also sufficiently established at trial. *See* R. Vol. IV at 52-56; R. Vol. III at 125-26. Appellant's final assertion, that it was error for the court to consider his Mississippi conviction in determining his criminal history level since that conviction occurred *after* the

commission of Utah crimes, is incorrect as a matter of law. In fact, the Tenth Circuit considered this very issue in *United States v. Fortenbury*, 917 F.2d 477, 479 (10th Cir. 1990), and concluded that subsequent criminal conduct occurring before sentencing for an earlier offense is a permissible basis for departing upward by criminal history category. Moreover, because appellant failed to designate the record on sentencing, we cannot evaluate the district court's consideration of criminal history in any further detail. We therefore affirm the district court's sentence as to these particular issues.

CONCLUSION

For the reasons given in this panel decision and in the en banc decision in this case issued concurrently herewith, we AFFIRM the district court in all particulars except as to appellant's consecutive sentence of 120 months on Count IV. As to that particular sentence, we REVERSE and REMAND for resentencing in accordance with our decisions.

BROWN, District Judge, dissenting:

For the reasons set for in the dissent in the en banc decision in *United States v. Abreu* and *United States v. Thornbrugh* (Nos. 89-4145, and 89-5166, 89-5173), ——F.2d ——, I must respectfully dissent.

APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 89-5166
89-5173

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE, CROSS-APPELLANTS

v.

JAMES DAVID THORNBRUGH,
DEFENDANT-APPELLANT, CROSS-APPELLEE

Appeal from the United States District Court
for the Northern District of Oklahoma
(D.C. No. 89-CR-67-B)

[Filed Apr. 13, 1992]

Before HOLLOWAY, BRIGHT,* and SEYMOUR, Circuit Judges.

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* Honorable Myron H. Bright, United States Circuit Judge for the Eighth Circuit, sitting by designation.

SEYMOUR, Circuit Judge.

James David Thornbrugh was convicted of three counts of armed bank robbery in violation of 18 U.S.C. §§ 2113(a) & (d) (1988), and three related counts of possession of firearms during the commission of a crime of violence under 18 U.S.C. § 924 (c)(1) (1988). On appeal, Thornbrugh raises several challenges to his conviction and also contends that his sentence was improperly enhanced under section 924(c). The court on its own motion ordered rehearing en banc in this case and in *United States v. Abreu*, No. 89-4145, limited to consideration of the proper interpretation of the enhancement provision in section 924(c)(1). Accordingly, Thornbrugh's sentencing argument is addressed in the en banc opinion of this court, filed simultaneously with this opinion. *See United States v. Abreu*, —— F.2d —— (10th Cir. Nos. 89-4145, 89-5166, 89-5173, filed April 13, 1992). Here we resolve the remaining issues Thornbrugh raises with respect to his conviction. He claims that: (1) the prosecutor's remarks during closing arguments violated his due process rights; (2) newly discovered evidence merits a new trial; (3) the government wrongly withheld exculpatory evidence; (4) the prosecution improperly alluded to his prior bank robbery convictions; and (5) the cumulative errors at trial require reversal. We conclude that these assertions do not require reversal of his conviction.

I.

FACTS

Thornbrugh was indicted on three counts of armed bank robbery and three related gun charges. The indictment filed against him specifically charged the

robberies of Local American Savings & Loan on January 6, 1989, of Continental Federal Savings & Loan Association on January 24, 1989, and of Village South National Bank on March 11, 1989. He was also charged with three counts of carrying a firearm in relation to a crime of violence, referring to the three robberies charged in the first part of the indictment.

The government's key witness at trial was Thornbrugh's accomplice, Gary Sewell, who had pled guilty to two of the three bank robberies. Sewell testified that in each robbery he stood by the door as Thornbrugh jumped over the teller counter and emptied the bank's registers. Sewell also testified that in each robbery Thornbrugh selected the bank to rob, supplied the guns (a .357 Wesson and a .380 Browning), and shouted orders for everyone to get on the floor. Sewell said that during each robbery he and Thornbrugh wore gloves and masks made from stockings.

Proof at trial revealed the following chronology with respect to the crimes. On January 6, 1989, Sewell and Thornbrugh traveled to Local American Savings & Loan in Thornbrugh's Chevrolet pickup and parked it two to three blocks away. After robbing the bank in less than three minutes, they ran behind a shopping center, climbed over a fence, and ran past a mail carrier. Upon arriving at Thornbrugh's pickup, they drove away followed by the mail carrier, at whom Thornbrugh pointed a gun.

On January 21, 1989, Sewell and Thornbrugh traveled to the Continental Federal Savings & Loan in Sewell's silver Camaro. As before, they were in the bank for under three minutes. They left in the Camaro, which Thornbrugh drove to his pickup in a parking lot. He then left in his truck, taking the money, guns, and masks. Meanwhile, Sewell drove

the Camaro to the Falls Apartments, where he was to meet Thornburgh to split money. A police officer questioned Sewell at the apartments. Upon searching the Camaro, the police officer found Thornbrugh's boots, belt, wallet, and driver's license. Sewell was not arrested at that time.

On March 11, 1989, Sewell and Thornbrugh robbed the Village South National Bank. They drove to the bank in a brown Ford Pinto Sewell bought to use in the bank robbery, and robbed the bank following the same plan as before. After the robbery, Thornbrugh drove the Pinto to a Ford LTD which they had parked in the general neighborhood of the bank. Special Agent McDade, United States Secret Service, and Larry Choate, president of Village South National Bank, had pursued the robbers at a distance following the robbery. Sewell put the money, guns, and masks in the trunk of the LTD and dropped Thornbrugh off at his pickup. Both McDade and Choate observed the license tag on the back of the pickup truck which Thornbrugh drove off. They recalled the license tag as Kansas number CU— - 151. They chose to follow Sewell, and he was subsequently arrested.

After Sewell's arrest, several items were recovered from the Ford LTD including a Browning .380 automatic, a Don Wesson .357 revolver, two nylon stocking masks, two pairs of brown gloves, one black and one blue baseball cap, items of personal clothing, and $1,647.00 in cash. On March 15, FBI Agent Jo Deatherage was present at Thornbrugh's home during his arrest. She observed a Chevrolet pickup parked in the driveway, with a Kansas license tag number, CUI-151.

Several eyewitnesses to each of the robberies testified and offered descriptions of the robber who took

the cash. Most of the eyewitnesses recalled that the robber was approximately six-feet tall, although some descriptions placed the robber between five-ten and six-feet. Thornbrugh is about six-two. No eyewitness except Sewell placed Thornbrugh at the scene of any of the robberies. Thornbrugh offered several alibi witnesses, including his father, co-workers, employer, and his employer's wife, all of whom confirmed Thornbrugh's alibis for each of the robberies.

Thornbrugh was convicted on all counts under 18 U.S.C. §§ 2113(a) & (d) and 924(c). On the three robbery counts, the district court sentenced Thornbrugh as a career offender with a total offense level of 34 and a criminal history level of VI. The imprisonment range at that level is from 262 to 327 months. With respect to the gun charges, the district court construed section 924(c) to require mandatory sentences of five years on the "first" count (count four), and enhanced sentences of twenty years for each "second or subsequent conviction" under section 924(c) (counts five and six). Thornbrugh therefore received an additional forty-five years on the section 924(c) gun charges. When added to the guideline range of 262 to 327 months, the additional forty-five years produced a possible sentence range of 802 to 867 months. The court departed downward based on its conclusion that the Sentencing Commission did not adequately consider "the effect of the cumulative sentence of 45 years mandatory . . . [as it] relates to the minimum guideline range required on Counts 1, 2 and 3." Rec., vol. XII, at 16. It therefore departed downward to a total of 543 months imprisonment. *Id.* at 16.[1]

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[1] In the en banc opinion filed this day, we hold that the court erred in construing section 924(c) to require enhancement for second or subsequent convictions under the circum-

II.

PROSECUTOR'S REMARKS DURING CLOSING ARGUMENT

Thornbrugh contends that his right to a fair trial was denied by the prosecution's inappropriate comments during closing arguments. Thornbrugh alleges prosecutorial error in the following exchange:

> "Mr. Lunn [defense counsel]: Well, what about the problems with Sewell? There are plenty of them. He changed his statements numerous times. You've heard that he has made many deals during the course of his life. It's terrible to think that a man with five felony convictions can possibly—
>
> Mr. Baker [prosecution]: If Your Honor please, that is an absolute untruth. The man said he had two felony convictions. This is misquoting the record. I object to it.
>
> Mr. Lunn: The man has—
>
> Mr. Baker: Just a minute, please.
>
> The Court: Ladies and gentlemen, you heard the evidence on that subject. I'm [sic] leave it to you to recall it. Proceed.
>
> Mr. Lunn: The man has pled guilty three times to bank robbery, and he has pled guilty twice to burglary.
>
> Mr. Baker: That again is untrue, Your Honor, and I ask you again to admonish this man to quit lying to the jury. He said he had been convicted twice. He pled guilty to two bank rob-

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stances here. A remand for resentencing is therefore necessary. Accordingly, we do not address the government's cross-appeal alleging error in the downward departure.

> beries and not three. That's the record in the case. Please admonish this man to stop lying.
>
> The Court: You heard the evidence, ladies and gentlemen. Proceed."

Rec., vol. X at 696-697.

Defense counsel did not object to these comments when they were made. We will therefore reverse only for "plain error." *United States v. Young*, 470 U.S. 1, 13-14 (1985); *United States v. Lonedog*, 929 F.2d 568, 570 (10th Cir. 1991). "Plain error is '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done.'" *Id.* (quoting *United States v. Henning*, 906 F.2d 1392, 1397 (10th Cir. 1990)).

Although attacks on defense counsel may constitute prosecutorial misconduct warranting reversal, the prosecutor's comments here were responsive to defense counsel's statements. *See Young*, 470 U.S. at 12. As we have stated previously: "[T]he fact that the prosecutor was responding to defense counsel's closing argument did not give him carte blanche to make improper statements. But the fact that the statement was part of a response and not part of a general attack on defense counsel lessened its effect." *United States v. Lowden*, 900 F.2d 213, 216 (10th Cir. 1990) (citation omitted). The substance of the prosecutor's objection expressed no opinion on the question of Thornbrugh's guilt. *Compare United States v. Rios*, 611 F.2d 1335, 1343 (10th Cir. 1979) (disapproving prosecutor's expression of personal belief in defendant's guilt), *cert. denied*, 452 U.S. 918 (1981). Furthermore, the prosecutor's statement that the record reflected that Sewell had two prior felony convictions, not five, had a factual basis. *Compare Rios*, 611 F.2d at 1342-43 (unfounded remarks

held prejudicial error); *see also* rec., vol. VIII, at 353 (evidence of Sewell's convictions at trial). The likelihood of prejudice was minimized by the district court's admonition to the jury prior to closing that closing arguments are "not evidence in the case at all." Rec., vol. X, at 667; *see United States v. Ellzey*, 936 F.2d 492, 498 (10th Cir. 1991) (residual prejudice arising from prosecutor's comments in closing eliminated by court's limiting instruction). Under these circumstances, we cannot find plain error.

The prosecutor also stated in his rebuttal remarks during closing:

> "Mr. Baker: While [defense counsel] was talking about this license tag that Agent McDade and Jo Deatherage said they didn't have any trouble reading, I wonder why he didn't explain to you who tampered with evidence in a federal criminal case and mutilated this license tag. He omitted somehow to tell you that, didn't he?"

Rec., vol. X at 699. Mr. Lunn objected to this statement, contending that "there has been no evidence of [tampering] whatsoever." *Id.* at 699-700. His objection was overruled. *Id.* at 700.

Because this comment was the subject of an objection, we assess it under the harmless error standard. *See Lonedog*, 929 F.2d at 572; *see also United States v. Alexander*, 849 F.2d 1293, 1296 (10th Cir. 1988); *United States v. Taylor*, 800 F.2d 1012, 1018 (10th Cir. 1986), *cert. denied*, 484 U.S. 838 (1987).

> "To determine whether defendants have been deprived of a fair trial, we must view the improper remark in the context of the entire record before the jury. We will not overturn the convictions unless the prosecutor's misconduct 'was enough

> to influence the jury to render a conviction on grounds beyond the admissible evidence presented.' "

United States v. Espinosa, 771 F.2d 1382, 1401 (10th Cir.), *cert. denied*, 474 U.S. 1023 (1985) (citations omitted). In evaluating whether a prosecutor's comment had an impermissible effect on the jury's deliberations, we consider: " 'the curative acts of the district court, the extent of the misconduct, and the role of the misconduct within the case as a whole.' " *Lonedog*, 929 F.2d at 572 (quoting *United States v. Martinez-Nava*, 838 F.2d 411, 416 (10th Cir. 1988)).

We conclude there was no reversible error with respect to the comments made during the prosecution's rebuttal. Although defense counsel contends that the statements "implicate[] Mr. Lunn [defense counsel] with tampering with evidence," Appellant's Opening Brief at 26, our reading of the record convinces us that this oblique reference to the alteration of the license tag number was not such as "to influence the jury to render a conviction on grounds beyond the admissible evidence presented." *Espinosa*, 771 F.2d at 1401. In light of the strength of the evidence presented by the government in this case, if the statement was error, it was harmless.

III.

DENIAL OF MOTION FOR NEW TRIAL

A motion for a new trial is not regarded with favor and should only be granted with great caution. *United States v. Kelley*, 929 F.2d 582, 586 (10th Cir. 1991); *United States v. Page*, 828 F.2d 1476, 1478 (10th Cir.), *cert. denied*, 484 U.S. 989 (1987). The denial of such a motion is addressed to the sound discretion of the trial court. *Id.*

A. Newly Discovered Evidence

Thornbrugh first argues that the district court erred in denying his motion for a new trial based on two instances of newly discovered evidence. Thornbrugh's new evidence consists of a statement by Woody Woodward that he sold the .357 Wesson to Gary Lynn Sewell, and the existence of two witnesses to the South National Bank robbery who would provide exculpating descriptions of the bank robber.

Thornbrugh argues that the trial court abused its discretion in denying his new trial motion without an evidentiary hearing. However, the district court implicitly assumed that the evidence was true and considered its impact on the outcome at trial. Rec., supp. vol. II, doc. 58 at 7-8. No evidentiary hearing to determine credibility was therefore necessary. *See United States v. Ramsey*, 726 F.2d 601, 605 (10th Cir. 1984).

In order for new evidence to merit a new trial, it "must be more than impeaching or cumulative; it must be material to the issues involved; it must be such as would probably produce an acquittal; and a new trial is not warranted by evidence which, with reasonable diligence, could have been discovered and produced at trial." *Page*, 828 F.2d at 1478 (quoting *United States v. Allen*, 554 F.2d 398, 403 (10th Cir.), *cert. denied*, 434 U.S. 836 (1977)). Under this standard, we are not persuaded that the district court erred in denying the new trial motion on the basis of new evidence.

With respect to the statement of Woody Woodward, the district court stated in its order denying a new trial that the new evidence would, at best, raise the possibility that Sewell used this gun in the robbery rather than a gun supplied to Sewell by Thorn-

brugh. Rec., supp. vol. II, doc. 58 at 7. The evidence would therefore be cumulative as to Thornbrugh's denial of any participation in the robberies and impeaching as to Sewell's testimony that Thornbrugh supplied both guns for the robberies. *Id.* The court also said "having heard all the evidence, that this possibility of additional cumulative and impeachment evidence would not produce (and would not have produced), in all probability, acquittal." *Id.* at 7-8. Given the record in this case and the district court's careful consideration of the impact that the new evidence would have had on the outcome, we conclude there was no abuse of discretion in denying a new trial based on the statement of Woody Woodward.

The district court similarly concluded that the testimony of the two identification witnesses did not merit granting the motion for a new trial:

> "[S]uch testimony . . . would have been cumulative as to the robbers being white males and impeaching as to the lack of beards and gray or graying hair of either of the suspects. It is clear Defendant's hair is predominantly dark, not gray. Neither witness nor both in the Court's estimation, would produce or would have produced, probably, an acquittal."

Id. at 8. Again, our review of the record and the district court's order indicates that the court carefully considered the probable impact of the new evidence under the appropriate legal standard and committed no abuse of discretion by denying the new trial on the basis of new evidence.

B. Withholding Exculpatory Evidence

Thornbrugh also contends that a new trial is warranted because exculpatory evidence was withheld by the government. "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where *the evidence is material* either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Page*, 828 F.2d at 1479 (quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and adding emphasis). Suppressed evidence is deemed material " 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.' " *Id.* (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985) (Blackmun, J. joined by O'Connor, J.)). In making this determination, we view the suppressed evidence's significance in relation to the record as a whole. *United States v. Wolf*, 839 F.2d 1387, 1391 (10th Cir.), *cert. denied*, 488 U.S. 923 (1988).

Thornbrugh contends that the government suppressed the testimony of Agent Deatherage in violation of his due process rights, thus entitling him to a new trial. According to Thornbrugh, Agent Deatherage gave conflicting descriptions of the pickup used in connection with the robberies in two separate affidavits. Agent Deatherage's affidavit dated March 13, 1989, described the truck identified by Agent McDade on March 11 as a "white GMC pickup with a Kansas tag." Rec., Supp. Vol. II, doc. 45, exh. B. Agent Deatherage's affidavit dated April 12, 1989 stated that McDade observed a "tan and white Chevrolet pickup with a Kansas tag CU —-151." *Id.* at exh. C.

Thornbrugh also contends that the prejudice arising from this alleged suppression was compounded by the fact that Agent Deatherage did not recall preparing the separate affidavits and denied any inconsistencies between descriptions of the truck.

The alleged suppression arising out of Agent Deatherage's conduct does not merit a new trial because it does not raise a "reasonable probability" of a different result. *Page*, 828 F.2d 1479. The district court concluded that it is unlikely the comparison of the two affidavits at trial would have affected the outcome because "these affidavits . . . are far more in harmony than in conflict." Rec., supp. vol. II, doc. 58 at 5. As explained by the district court:

> "The Court is aware and the record supports the very similar appearance of Chevrolet and GMC pickup vehicles, both being General Motors products. A later description of a 'GMC pickup' as being a 'Chevrolet pickup' is not, in the Court's mind, a serious variance. The pickup's color (white, later described in greater detail as tan and white) is more of an enlargement of description rather than a discrepancy. The license tag was more fully described to include the tag number as reported by Agent McDade. There is no discrepancy whatsoever as to the tag in the Deatherage affidavits."

Id. at 5-6 (footnote omitted).

The district court also relied on the availability at trial of the two affidavits to defense counsel in rejecting Thornbrugh's claim that exculpatory evidence was wrongly withheld.

> "The two affidavits were available to Defendant during trial. If Defendant considered the two Deatherage affidavits sufficiently conflicting it

> was incumbent upon him, through his counsel, to utilize the same during trial for impeachment purposes. Defendant argues the later affidavit was not "introduced into evidence because it alledged that Defendant Thornbrugh had been picked up because of a parole violation.' The affidavit, in redacted form, was available for use but was not used—a tactical choice within the Defendant's control."

Id. at 6. The district court's conclusion in this respect is consistent with our decisions establishing that there is no violation of a defendant's right with respect to production of exculpatory evidence when such evidence is available at trial. *See United States v. Behrens*, 689 F.2d 154, 158 (10th Cir.), *cert. denied*, 459 U.S. 1088 (1982); *United States v. Alberico*, 604 F.2d 1315, 1319 (10th Cir.), *cert. denied*, 444 U.S. 992 (1979).

Thornbrugh also contends that the government withheld exculpatory evidence by failing to provide the defense with the correct escape route of the robbery suspects and the fact that there were two witnesses along the escape route, Darlene Slotterback and Darlene Rudner. The district court held that the testimony of the two new witnesses was cumulative, and that in light of the record it would not have created a reasonable probability of a different outcome. There was no abuse of discretion in denying the motion for a new trial on the basis of this "withheld" [2] evidence, because such evidence was not exculpatory.

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[2] We note that there is no clear evidence in the record that the government actually suppressed the correct escape route or the witnesses' statements. On appeal, the government maintains that "the names and addresses of the [witnesses] were never supplied to the government by any investigating agency." Government Brief at 36-37.

Finally, Thornbrugh contends that exculpatory fingerprint evidence was improperly withheld. The record nowhere indicates that the prints would be exculpatory. In the absence of any support for the contention that the fingerprints constitute exculpatory evidence, we are precluded from reversing the district court's denial of a new trial based on the suppression of this evidence.

IV.

REFERENCE TO DEFENDANT'S PRIOR CONVICTIONS

Thornbrugh asserts that his right to a fair trial was compromised because the prosecution's witness, Gary Sewell, implied that Thornbrugh was an experienced bank robber by unfairly alluding to his prior convictions. The exchange at trial during defense counsel's cross-examination of Sewell was as follows:

> "[Mr. Lunn] You weren't so to speak, led by a leash by your accomplice with regard to doing this robbery?
>
> "[Mr. Sewell] I was told by my accomplice what to get and what to do. I'm not a bank robber. I don't know how.
>
> "[Mr. Lunn] All right. I'd like to ask you questions about the second robbery . . . ."

Rec., vol. IX, at 442-43. The trial transcript reveals that there was no objection to Sewell's remark. The alleged error is therefore reviewed under a plain error standard. *See Lonedog*, 929 F.2d at 570. Accordingly, we will not reverse unless the statement

constituted "something . . . so prejudicial . . . that justice cannot have been done." *Id.*

Sewell's statement was not sufficiently prejudicial to constitute plain error. As the district court concluded in its order denying the new trial, "the statement made by . . . Sewell . . . was not prejudicial to Defendant's case, in that it makes no reference, by insinuation or otherwise to Defendant's prior record." Rec., supp. vol. II, doc. 58, at 4. We agree that Sewell's comment did not highlight Thornbrugh's prior convictions. Other cases where mistrials were requested suggest that, given the nature of Sewell's comment, a new trial is not warranted. *See, e.g., United States v. Kendall*, 766 F.2d 1426, 1437 (10th Cir. 1985) (testimony that defendant had sold airplane to pilot who had used it in earlier drug smuggling venture), *cert. denied*, 474 U.S. 1081 (1986); *United States v. Walton*, 552 F.2d 1354, 1365-66 (10th Cir.) (testimony that defendant interviewed by FBI while in jail on another matter), *cert. denied*, 431 U.S. 959 (1977); *United States v. Woodring*, 446 F.2d 733, 737 (10th Cir. 1971) (testimony that defendant subject of unrelated criminal charge).

Thornbrugh contends that the error should be deemed prejudicial when one considers that the Government's case against Thornbrugh was a relatively weak one. Our review of the record, however, confirms the conclusion of the district court that there was more than sufficient evidence for the jury to return a guilty verdict. Rec., supp. vol. II, doc. 58, at 8; *compare United States v. Sands*, 899 F.2d 912, 915-16 (10th Cir. 1990).

V.

CUMULATIVE ERROR

Thornbrugh argues that even if no individual error warrants reversal, the cumulative effect of the errors at trial do. In *United States v. Rivera*, 900 F.2d 1462, 1469 (10th Cir. 1990) (en banc), *cert. denied*, 111 S. Ct. 2249 (1991), we stated that: "The cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error." The purpose of a cumulative error analysis is to address that possibility.

In this case, the district court explicitly stated in denying Thornbrugh's motion for a new trial that:

> "In sum, the Court restates it heard all of the evidence, viewed the demeanor of all of the witnesses, considered all of the exhibits and heard all the argument and concludes there was more than ample evidence upon which the jury based its verdict. There was solid corroborative evidence in support of accomplice Sewell's testimony."

Rec., supp. vol. II, doc. 58 at 8. Our own review of the record also bears out the conclusion that the alleged errors and prosecutorial misconduct, viewed in the aggregate, did not have a prejudicial effect on the jury's verdict.

In sum, we AFFIRM Thornbrugh's convictions. However, we hold today in our en banc opinion that Thornbrugh's sentence was improperly enhanced for a second or subsequent conviction under section 924 (c). Such an enhancement is only proper when the underlying offense was committed after a judgment

of conviction on the prior section 924(c) offense. *See United States v. Abreu*, —— F.2d —— (10th Cir. Nos. 89-4145, 89-5166, 89-5173, filed April —, 1992). Accordingly, we REMAND for resentencing in light of our en banc opinion.

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